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No. 93-1710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PHILIP MORRIS INCORPORATED
(d/b/a PHILIP MORRIS U.S.A.),
Petitioner,

v.

CABARRUS COUNTY, NORTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

There has been no change in the information provided in the Rule 29.1 Statement in the Petition.

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. Introduction

Respondent attempts to make five points in its brief in opposition: (1) the Due Process issue is not significant; (2) the record is not well developed for consideration of the issue; (3) the case law supports respondent's position in any event; (4) petitioner has raised a new issue at the certiorari stage; and (5) the case may become moot because petitioner may prevail in the remand proceedings.

For the reasons indicated below, none of these points justifies a denial of the petition.

II. Respondent's First Four Points Have No Merit

1. Contrary to respondent's view, the Due Process issue is quite significant. It potentially affects all business taxpayers in Cabarrus County and countless business taxpayers located in other counties in North Carolina, as well as in Kansas, Wyoming, Connecticut and possibly in other states as well. It raises fundamental questions regarding the propriety of the tax assessment process conducted by local governments in various parts of the United States.

2. The record is quite well developed for purposes of this Court's consideration of the issue. The following points are clear:

—with no funds for staff auditors, respondent retained TMA under a contingent fee agreement to assist the County Assessor by conducting personal property tax audits of business taxpayers (Resp. Br. Opp. 5; Pet. App. 22a-24a);

—the agreement with TMA provided for a fee equal to 35 percent of "taxes discovered," with partial payment to be made on issuance of the discovery notice (Pet. App. 23a);

—under the agreement, TMA would receive no fee whatever if it failed to "discover" new taxes; conversely, the more taxes it discovered, the greater the fee it stood to receive (Pet. App. 22a-24a);

—"as a direct result" of the agreement, TMA conducted a personal property tax audit of petitioner, the largest taxpayer in the County (Pet. App. 9a, 24a);

—TMA issued a report to respondent's Assessor proposing a "discovery" of $975 million of property (Pet. App.58a); and

—based on TMA's report, the Assessor issued a discovery, presumed to be correct, in the amount of $923 million (Resp. Br. Opp. 4; Pet. App. 33a).

Those facts are all that is necessary to establish a Due Process violation here.[1]

3. The relevant case law clearly supports petitioner, not respondent. Respondent's effort to squeeze something helpful out of *Tumey* v. *Ohio*, 273 U.S. 510 (1927), falls far short of the mark. Respondent apparently quotes *Tumey* as it does because it believes that the work of TMA is similar to that of a detective, i.e., a mere fact gatherer. That is not the role of the business personal property tax auditor.

The tax auditor's job is to determine whether the return filed by the taxpayer satisfies the requirements of the law for reporting and valuing property. If it does not, the auditor proposes an assessment. That is a quasi-judicial or prosecutorial function, not a mere fact-gathering function. As the North Carolina Property Tax Commission stated in condemning the practice of using contingent fee auditors such as TMA:

> [I]t is the opinion of the Commission that sound tax policy is not served where individuals or organizations have a financial interest in the assessment of property tax or the amount collected. The implementation of such an *enforcement program* can only lead to abuses in the *enforcement system* or at the

[1] Interestingly, while arguing that the record is not sufficiently developed for consideration of the Due Process issue, respondent unabashedly laces its statement of the case with factual assertions that contain no citation to the record or to any other source. (Resp. Br. Opp. 2-5.)

> very least, the appearance to the public of such abuses.

Pet. App. 27a (emphasis added).

Whatever this Court may have intended by its references to the use of detectives in *Tumey*, it cannot be relevant here.

4. Petitioner has not raised any new issues at the certiorari stage. The constitutional issue raised throughout the proceedings is whether petitioner has been denied Due Process by virtue of respondent's use of TMA to conduct a tax audit of its personal property on a pure contingent fee basis. While emphasizing the application of *Tumey*, petitioner has pointed out the confusion created by this Court's prior decisions regarding the status of a tax assessor as a judicial or quasi-judicial official. In its petition, petitioner has argued that if respondent's Assessor is not acting in a judicial capacity subjecting him (through TMA as his agent) to the *Tumey/Ward* line of cases, he must be acting in a prosecutorial capacity, thereby implicating the Due Process concerns expressed in *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980).

Petitioner's argument does not constitute the raising of a new issue at the certiorari stage; it is merely " 'but another ground or reason for alleging the invalidity of the [lower court's] judgment.' " *Illinois* v. *Gates*, 462 U.S. 213, 219-20 (1983) (quoting *Dewey* v. *Des Moines*, 173 U.S. 193, 197-98 (1899)).

III. The Judgment of the Court Below Satisfies the Finality Requirement

Respondent also contends that the judgment below is not final. Respondent reasons that if, on remand,

petitioner's tax liability were computed in the manner for which petitioner contends, petitioner's liability could be completely eliminated.[2]

Unfortunately, respondent's contention is not valid. Not only is petitioner not entitled to a true *de novo* review of the assessment before the Property Tax Commission, but under state law petitioner is effectively entitled to *no review* of any "insubstantial" adjustments proposed by TMA. As petitioner explained in its petition, the findings of the Assessor are not reviewable unless they are both (1) arbitrary or illegal, and (2) create a "substantial" misvaluation of the taxpayer's property. (Pet. at 17-19. *See also In re Highlands Development Corporation*, 80 N.C. App. 544, 546, 342 S.E. 2d 588, 589 (1986).) It is therefore a virtual certainty that, even if all of petitioner's state law arguments which the Commission could properly entertain on remand were accepted, the federal Due Process issue would not be mooted.

If, however, the possibility of mootness is seen to exist, respondent itself nevertheless acknowledges that the instant case could fall within the fourth category of cases discussed in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975) (cases with further proceedings pending in which the petitioner might prevail on nonfederal grounds, but where reversal by this Court on federal grounds would end the litigation and where refusal immediately to review the state court decision "might seriously erode federal policy"). In

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[2] The hearing on remand was begun on May 9, 1994. Briefs were submitted on May 31, 1994. The decision of the State Property Tax Commission is expected shortly.

respondent's view, however, "there is no important federal policy that would be undermined" by delaying review at this time. (Resp. Br. Opp. 14.)

Respondent again fails to grasp the significance of the *Tumey/Ward* line of cases. Over a period of 67 years, those cases have established a clear federal policy of ensuring unbiased and disinterested adjudications at the local level. *See also Marshall* v. *Jerrico, Inc.*, 446 U.S. at 242.

The Due Process interest in ensuring the fair and impartial enforcement of local tax assessment laws seems overwhelming. If the issue here presented is not resolved at this time, the offensive practice under challenge will be allowed to continue for an indefinite period in North Carolina and in those other states that still permit it. Yet, as the Supreme Court of Georgia declared in considering the practice:

> The people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded.

Sears, Roebuck & Co. v. *Parsons*, 260 Ga. 824, 825, 401 S.E. 2d 4, 5 (1991).

The words of the Georgia Supreme Court are as much words of Due Process as they are words of public policy. They underscore the point that fundamental federal principles are at stake in the instant case. Allowing an indefinite continuation of the contingent fee audit practice will significantly undermine the federal policy established by numerous decisions of this Court dating back to 1927. Under this Court's "pragmatic approach" to finality as described in *Cox*

Broadcasting, 420 U.S. at 486, the judgment below is final and reviewable by this Court.

If this Court remains concerned about the possibility of the case becoming moot on remand, it may wish to await the Commission's decision before acting on the petition. Because there is no prospect that the lower courts will reconsider petitioner's Due Process claim, however, this Court should not in any event require a further, fruitless trip by petitioner through the North Carolina court system merely to preserve the Due Process issue for the filing of a second petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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